

Clinical Sociology Review

Volume 15 | Issue 1

Article 20

1-1-1997

Law in a Therapudic Key

Sarena W. Mayer
Touro College

Follow this and additional works at: <http://digitalcommons.wayne.edu/csr>

Recommended Citation

Mayer, Sarena W. (1997) "Law in a Therapudic Key," *Clinical Sociology Review*: Vol. 15: Iss. 1, Article 20.
Available at: <http://digitalcommons.wayne.edu/csr/vol15/iss1/20>

This Book Review is brought to you for free and open access by DigitalCommons@WayneState. It has been accepted for inclusion in Clinical Sociology Review by an authorized administrator of DigitalCommons@WayneState.

using these technologies, autistics can repeat the experience many times, so that when they actually encounter the situation, they are prepared for it.

Very rarely does a book mix important theoretical issues with practical advice for helping people. *Autism and the Crisis of Meaning* is such a book.

Law in a Therapeutic Key, edited by David B. Wexler and Bruce J. Winick. Durham, NC: Carolina Academic Press, 1996. 1,012 pp. No price listed. ISBN 0-89089-988-6.

Sarena W. Mayer, Esq.

Touro College, Jerusalem, Israel

Therapeutic jurisprudence is an interdisciplinary study of the role of law as a therapeutic agent. This analysis of the law proposes that legal rules, legal procedures and the roles of legal actors, including lawyers, judges and law enforcement agents, are social forces that often have a therapeutic or antitherapeutic effect on the individuals and ultimately the society they govern. Although, historically, the study of law has focused on rules of law, the rights of individuals and legal entities, and the consequences for violations of such rules and the infringement of such rights, this discipline challenges us to examine the interplay between such legal forces in an entirely different light.

The objective of therapeutic jurisprudence is that we increase our sensitivity to the therapeutic or antitherapeutic effects of our legal system and ask whether the law's antitherapeutic consequences can be reduced and its therapeutic consequences enhanced while upholding the integrity of due process and other values of justice that have evolved over the past centuries. Further, in addition to taking a somewhat retrospective look and analyzing the law that has already evolved, therapeutic jurisprudence proposes that we explore ways in which the knowledge, theories and insights of mental health and its related disciplines can help shape the future development of the law.

The authors are veritable pioneers in this remarkably new discipline. As stated in one of the book's articles (Ch. 28 by Finkelman and Grisso), therapeutic jurisprudence was first introduced by Wexler in a paper submitted in 1987 for a workshop sponsored by the National Institute of Mental Health. By 1991, two edited volumes on the topic, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (David B. Wexler ed. 1990) and *Essays in Therapeutic Jurisprudence 9* (David B. Wexler & Bruce J. Winick eds. 1991) were published. Since then, therapeutic jurisprudence has influenced the thinking of an increasing number of scholars in both the legal and mental health fields.

Although one may logically surmise that therapeutic jurisprudence applies

exclusively to the study of mental health law, or may conceivably be extended to the study of law and psychology, through their book, the authors have amply demonstrated that it is not so limited. Rather, therapeutic jurisprudence is a conceptual framework which, in their words, "brings together a number of topics that have not generally been recognized as related." I strongly agree with this description, but would first like to take a step back and give an overview of the book and then delve into some of the many examples of this characterization.

Law in a Therapeutic Key is an exceptionally comprehensive collection of fifty articles, each a separate chapter in the book. The book is comprised of three parts. Part One focuses on the expanding legal breadth of therapeutic jurisprudence. Although the scholarship in this area was rooted in mental health law, it has since expanded to many other areas of law. Accordingly, Part One contains articles relating to the therapeutic perspective of mental health law in addition to a number of different and varied fields of law including, *inter alia*, domestic relations, disability, health, evidence, contract and personal injury and tort law. Part One closes with an interesting article comparing the therapeutic characteristics of arbitration, a widely utilized form of alternative dispute resolution ("ADR"), with those of psychological counseling. With twenty-seven chapters and 584 pages, Part One represents the lion's share of submissions. The focus of Part Two is quite different. This Part consists of essays on or about therapeutic jurisprudence rather than essays illustrating the use of therapeutic jurisprudence. Thus, Part Two is more of a critique of this approach to the law. Part Three contains eight chapters relating to the empirical work that has been performed to date in this field and offers an insight to the gap which exists between therapeutic jurisprudence as a theory and the empirical testing of the assumptions underlying the theory which have been introduced to the reader throughout the earlier chapters of the book.

I admit that, before reading *Law in a Therapeutic Key*, I was unaware that such a study of law existed. In class, I teach my students about two classic approaches to the study of law, or jurisprudence: the traditional approach and the environmental approach.¹ As an attorney trained in mediation, an alternate method of ADR whose practitioners include both mental health and legal professionals, I was intrigued by an analysis of law that is not only an entirely new approach to jurisprudence, but one which, at its core, combines both psychology and law in achieving its stated objective.

The approach is very interesting. For example, whereas an attorney is

¹The latter is also referred to as "sociological jurisprudence" with its emphasis on how social change is accomplished through use of the legal system.

trained to consider procedural due process as a Constitutional right mandating strict procedural safeguards to ensure the fairness of a governmental decision before an individual may be deprived of "life, liberty or property" (Fifth and Fourteenth Amendments to the U. S. Constitution), the therapeutic jurisprudence approach conceptualizes due process as giving people judicial procedures they will *perceive* as fair, thus influencing an individual's everyday behavior toward the law. As such, the focus turns to the procedure itself and the individual's participation therein, the amount of dignity with which the person is treated and the degree of trust placed in the authorities with whom he or she is dealing (Ch. 1 by T. Tyler). As another example, from a purely legal perspective, labeling an individual "incompetent" alters certain rights. In criminal proceedings, for example, an adjudication of incompetence will suspend the legal proceedings and will negate the requisite *mens rea*, or wrongful mental state, necessary for a finding of guilt. Similarly, one who is adjudicated incompetent is deemed not to have the requisite capacity to enter into legally binding contracts. The therapeutic jurisprudence approach examines what psychological effect such labeling is likely to have on the individual. It explores such issues as how such adjudication may contribute to a feeling of helplessness and what effect it is likely to have on the individual's motivation and mood (Ch. 2 by B. Winick).

Although the chapters relating to the two examples above directly relate to mental health law, most chapters relate to other areas of law. One chapter which dealt with domestic violence advocated the use of the principles of cognitive therapy in its approach to the legal handling of offenders. So, for example, given the general tendencies of domestic violence offenders to minimize the harm and severity of their attacks and to externalize blame and even deny their behavior, the use of plea-bargains in these cases is discouraged since it allows the offenders to escape responsibility for the actual crimes, thereby reinforcing their cognitive distortions (Ch. 13 by L. Simon). A particularly interesting application of the therapeutic jurisprudence approach related to actions in tort. It queried whether individuals experiencing transient situational stress should be subject to the same objective "reasonable man" standard as the general public in determining liability for negligence. The subsequent analysis took the reader on a roller coaster ride of conflicting considerations and policies before it came to a full stop, advocating a limited subjective standard of care for those who instituted treatment for their mental or emotional problem in good faith before the occurrence of their injury-producing conduct (Ch. 20 by D. Shuman). This conclusion, however, was then challenged in the following chapter which advocated a much narrower exception for nonliability (Ch. 21 by G. Morris).

I particularly enjoyed the chapter comparing the process of arbitration with that of psychological counseling (Ch. 25 by Abrams, Abrams and Nolan),

although I respectfully submit that a stronger comparison would have been between the process of counseling and that of mediation, which, unlike arbitration, is a method of ADR which is nonadversarial. A skilled mediator must be able to establish rapport and gain the trust of the participants as well as determine the nature of the underlying conflicts. The mediator's goal, unlike that of the arbitrator which is to objectively weigh the evidence and make a binding determination, is to help facilitate the parties' mutual agreement thus empowering the participants to actively resolve their dispute. Nevertheless, I found the juxtaposition of the process of a form of ADR and that of counseling quite unique and refreshing.

Although I did find certain concepts somewhat repetitive and some chapters held my attention less than others, in all, I feel that *Law in a Therapeutic Key* makes a significant contribution to the furtherance of this study of law. I have begun to incorporate some of its premises into my lectures and find that after reading this comprehensive work I have begun to view laws and procedures which I previously took for granted in a different light. I wish the authors much success in realizing their hope that *Law in a Therapeutic Key* "will stimulate thought, further scholarship and needed law reform."